IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

HEADWATERS FOREST DEFENSE, et al,

Plaintiffs,

v

COUNTY OF HUMBOLDT, et al,

Defendants.
/

No C-97-3989-VRW

ORDER.

Plaintiffs have filed a motion regarding the situs of trial. By this motion, plaintiffs seek to move the trial to San Francisco from Eureka, the location designated by the court at the January 23, 2003, further case management conference. See Doc # 276. Defendants oppose plaintiffs' motion. See Doc # 294.

I

At the January 23, 2003, case management conference held after remand of the case by the Ninth Circuit, the court informed the parties that trial would be conducted in Eureka.

Contrary to plaintiffs' characterization, this did not

constitute a "change of venue." Venue refers to the judicial district or division in which an action proceeds. See 28 USC §§ 1391, 1404 (discussing venue as the "judicial district" or "division" in which a suit may be brought or transferred). The Northern District of California includes Humboldt County. 28 USC § 84(a). Plaintiffs properly commenced this action in the Northern District of California as the judicial district in which defendants reside and in which the events at issue substantially occurred. See Compl (Doc #1); 28 USC § 1391.

Unlike some other districts, the Northern District of California is not statutorily divided into separate divisions. Compare id § 84(a) with id § 84(c) (Central District of California comprises three divisions: eastern, western and southern). The Northern District of California is authorized to conduct proceedings at "Eureka, Oakland, San Francisco, and San Jose." Id § 84(a). The Northern District's civil local rules provide that the court shall be in "continuous session in the following locations: San Francisco Division, Oakland Division and San Jose Division." Civil LR 3-1. By implication, therefore, the court is in non-continuous session at Eureka. More importantly, the "Divisions" referred to in the local rules are not "divisions" in the statutory sense, but simply shorthand references adopted for administrative convenience. Indeed, the civil local rules also provide that: "From time to time sessions may be held at other locations within the district as the Court may order." Id. Thus, the court may conduct business at places other than those provided by statute.

"A district court may order any civil action to be tried

at any place within the division in which it is pending." 28 USC § 1404(c). As the Northern District is not a statutorily "divided" district, cases may be tried at any place in the district. The decision to set the trial location is vested in the discretion of the district court; the court need not present "good cause" for setting the location of trial pursuant to 28 USC § 1404(c). El Ranco, Inc v First Nat'l Bank of Nevada, 406 F2d 1205, 1219 (9th Cir 1968), cert denied, 396 US 875 (1969). The Ninth Circuit has explained that the district court's decision to move the place of trial after a previous trial in the case resulted in a hung jury is "entirely in the discretion of the trial court." Lung v United States, 111 F2d 640, 641 (1940). No "affirmative showing" to justify the transfer is necessary as long as it comports with federal statutes. Id at 640-41.

Eureka, of course, is located within the Northern District, 28 USC § 84(a), and cases arising there are assigned to judges maintaining chambers in San Francisco and Oakland. See Civil LR 3-2(d). Even assuming without deciding that the divisions created by civil local rule may alter the operation of the venue statute, the decision to conduct the second trial in Eureka is authorized by 28 USC § 1404(c). No reassignment or venue transfer occurs by virtue of holding trial in Eureka as opposed to San Francisco or elsewhere in the district. Hence, plaintiffs suffer no injury to their choice of venue in the Northern District. Because there has been no change of venue, plaintiffs' motion to "change venue" is DENIED.

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II

Plaintiffs, however, argue that they cannot obtain a fair trial in Eureka. In support of that contention, plaintiffs supply eight declarations, three of which are identical except for the declarant's identity, and numerous newspaper clippings, only one of which directly relates to this case. See Doc #278. On the date of the hearing on this matter, plaintiffs also submitted supplemental materials, including a newspaper advertisement, a press release and a videotape of a television commercial paid for by Pacific Lumber, none of which also directly relates to this case. The gist of plaintiffs' contention is that Eureka is a battleground of the "Timber Wars," a community heatedly divided between those favoring timber harvesting and those favoring environmental protection. In this contentious atmosphere, plaintiffs say they cannot receive a fair trial.

The court finds surprising the suggestion that this controversy has not reached San Francisco or that a jury drawn from Bay area counties would be any less riven by the competing values the two sides of this controversy represent. See, e g, "Kopp Wants Harsher Bridge Protest Penalty", S F Chron, Dec 3, 1996, at A18 (discussing reaction to environmental protestors who disrupted traffic on the Golden Gate Bridge to denounce government action concerning the Headwaters forest in Humboldt County); B W Rose, "S R Gap Site of Logging Protest", Santa Rosa Press Democrat, Nov 28, 1998, at B1 (discussing protests in San Francisco, Berkeley and Santa Rosa to protest logging plans on the North Coast); Malcolm Glover, "Protest against Pac Bell results in five arrests", S F Examiner, May 3, 1996, at A10 (discussing protest of local

utility's use of paper harvested from Canadian forests). But the main point remains, this case is not about the so-called "Timber Wars". The case is about police practices. In that regard, it matters not what cause plaintiffs had undertaken to support. The case concerns the reasonableness of the defendants' conduct, not the worthiness or contemptability of plaintiffs' cause. Assessing the reasonableness of defendants' conduct is made best by a jury drawn from the community most directly affected.

A

Plaintiffs contend that they have established the sort of pervasive community bias warranting a transfer of trial location. Plaintiffs rely on a series of cases, including Irvin v Dowd, 366 US 717 (1961), Groppi v Wisconsin, 400 US 505 (1971), and Pamplin v Mason, 364 F2d 1 (5th Cir 1966), for the proposition that voir dire would be futile because "jurors' statements of impartiality, as expressed in voir dire in a community where feelings run high, can be given little weight." Pls Mem (Doc #277), at 6 (internal quotation omitted).

It is true that if a "pattern of deep and bitter prejudice is shown to be present throughout the community," then trial in that particular community may not be appropriate. Irvin, 366 US at 727 (internal quotation omitted). In Irvin, the Court was confronted with the Fourteenth Amendment implications of a jury of which two-thirds had expressed "an opinion that [the defendant] was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take

evidence to overcome their belief." Id. Nearly 90% of the 430 potential jurors in that case expressed some belief in the defendant's guilt. Id. "Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight." Id.

Even if the court were to apply the heightened due process protections owed to the criminally accused, such as the capital defendant in Irvin, to plaintiffs' civil rights claims, plaintiffs have not demonstrated that voir dire will be futile or a sham. Certainly, the court will take all proper measures to ensure the empanelment of a fair and impartial jury in accordance with the parties' due process rights. And there are several material differences between the circumstances of the cases relied upon by plaintiffs and the case at bar which indicate that an impartial jury may be empaneled in Eureka.

While there evidently continues to be highly publicized disputes between environmental and logging advocates in Eureka and elsewhere in the Northern District, the incidents directly at issue in this case occurred six years ago. This is not a case in which a "wave of public passion" has been created as a result of pretrial publicity concerning the evidence in the case. Plaintiffs make only opaque and vague references to a climate of physical confrontation and in their declarations refer specifically to only one incident resulting in a police report.

Plaintiffs' declarations and newspaper clippings convey the impression of a community divided on the issues timber harvesting between environmental activists and logging interests, a debate ongoing for several years. News accounts and public

dialogue concerning the Humboldt County district attorney's suit against Pacific Lumber regarding that company's timber harvesting plans and other disputes between environmentalists and loggers are not directly related to the reasonableness of the use of pepper spray in this case and seem unlikely to result in a jury pool thoroughly tainted with preconceived notions of the evidence or ultimate issues in this case.

"[I]t is not required * * * that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case." Irvin, 366 US at 722-23. "To hold that the mere existence of any preconceived notion [of the ultimate issues], without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Id.

To the extent plaintiffs attack the impartiality of jurors that have not been selected, these arguments seem premature and are properly raised instead during the jury selection process. The Ninth Circuit has long held that "[t]he effect of pretrial publicity can be better determined after the voir dire examination of the jurors." Narten v Eyman, 460 F2d 184, 187 (9th Cir 1969) (internal quotation omitted). In the instances that a change of trial site or venue was found to be appropriate before jury

selection, courts found convincing empirically sound evidence of the level of community bias. See Washington Public Utilities Grp v United States Distrct Court, 843 F2d 319, 322 (9th Cir 1988) (district court presented with "statistical evidence" including "an affidavit * * * analyzing * * * public perceptions * * *, a statistical survey designed to measure public opinion and attitudes towards parties and issues in the case, along with an analysis of the survey results"). Plaintiffs have offered no such evidence in connection with the instant motion, which would allow the court to gauge whether the nature of community sentiment precludes selection of an impartial jury from Eureka and the surrounding areas.

In addition, plaintiffs do not claim that the prejudice within the community is targeted uniformly against them. See Swindler v Lockhart, 495 US 911, 912-13 (1990) (Marshall, J, dissenting) (expressing due process concern in criminal trial in which 98 out of 120 venirepersons expressed a belief that defendant was guilty: one venireperson noted that he had never heard "anybody state that they thought [defendant] was not guilty").

Plaintiffs' declarations and media clippings all note the divided nature of the community. In other words, many in the Eureka community support environmental activists on issues of land use. The presence of meaningful disagreement within the community means that there is no "huge wave of public passion" against plaintiffs. Of course, citizens partial to one side or the other and unable to discharge properly their duties as jurors have no place in the jury box. But plaintiffs have not credibly established that the court will be unable to seat a jury capable of rendering an impartial verdict.

B

Plaintiffs also contend that trial in Eureka would pose a threat of physical violence against them and their attorneys. See, e g, Serra Decl (Doc #276, Exh A). The parties may rest assured that the court is working with the United States Marshal to secure the trial location for the protection of the litigants. Although one of plaintiffs' attorneys asserts that he believes he will be subject to direct threat and assault during trial, no such threats have been identified. Insofar as plaintiffs or their attorneys perceive specific threats to their physical safety at court, they are directed to advise the court and the United States Marshal immediately.

C

Plaintiffs also argue that they would suffer prejudice from a Eureka trial because local jurors would favor defendants and their attorneys as "the home team." Pls Mem (Doc #277), at 5. According to plaintiffs, "no matter how thorough the voir dire may be, human nature will lead jurors to favor 'their own.'" Id. But as defendants point out, several plaintiffs are residents of the community, and plaintiffs have not explained why a jury assembled in Eureka would blindly regard defendants and counsel as the "home team" and render judgment in their favor on that basis. Indeed, the court notes that one of the remaining individual defendants, former Humboldt County sheriff Dennis Lewis, lost his re-election campaign after the events in question in this case and that Humboldt County voters elected a district attorney who promptly sued Pacific Lumber for allegedly fraudulent logging practices.

There is no reason for the court to believe that a properly selected jury would be biased in favor of defendants as "the home team."

A related argument made by plaintiffs is that because any damage award would be paid out of the city's and county's coffers, a jury composed of Humboldt County and Eureka taxpayers would have a financial interest in the outcome of the case, thereby biasing their decision. But the Ninth Circuit has explained that "an immeasurable and seemingly insignificant economic benefit to a taxpayer [does not] suffice[] to disqualify" potential jurors from service. Los Angeles Memorial Coliseum Comm'n v National Football League, 726 F2d 1381, 1400 (9th Cir 1984), cert denied, 469 US 990 (1984) (no prejudice in jury in which four of eight jurors were not Los Angeles county residents and in which the judge was satisfied with responses to questions during voir dire concerning any financially motivated bias); cf United States v Brown, 540 F2d 364, 379 (8th Cir 1976) (no basis to strike jurors for cause based solely on their residency in the county allegedly defrauded by defendants).

In this case, pursuant to established court procedure, jury summonses have been sent out not only to Humboldt County residents but also to those in Del Norte, Mendocino and Lake counties, and the court will undertake to examine potential jurors on whether any financial motivation would render them unfit for service.

Moreover, trial of the case in Eureka would afford an opportunity for residents in a portion of the Northern District not normally able to serve on a federal jury as a practical consequence

of distance to do so.

Although the Northern District of California is not statutorily divided into divisions, pursuant to 28 USC § 1869(e) the court's Gen Ord No 6 divides the district into "divisions for jury selection purposes." Id. The "San Francisco-Oakland jury division" consists of Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo and Sonoma counties; the "Eureka jury division" consists of Del Norte, Humboldt, Lake and Mendocino counties. Pursuant to the court's random jury selection plan, see 28 USC § 1863, jurors for trials held in San Francisco or Oakland are selected from both the San Francisco-Oakland and Eureka "jury divisions." See Order of Chief Judge Marilyn Hall Patel, Feb 3, 2003, Notice of Refilling the Qualified Jury Wheel. But a potential juror "residing more than 80 miles from the place of holding court" obtains, upon request, an excuse from jury service in light of the "undue hardship or extreme inconvenience" such service would entail. See Gen Ord No 6, § X.

As a result, residents of the "Eureka jury division" seldom have an opportunity to serve on juries in this district. Court records show that on the last occasion on which juror qualification questionnaires were sent to residents of Del Norte, Humboldt, Lake and Mendocino counties for possible service at either San Francisco or Oakland, only 63 potential jurors out of 2,100 did not request to be excused and were otherwise qualified for service. This circumstance is plainly problematic in light of Congress's directive that all residents of a district should have the opportunity to serve as jurors. See 28 USC § 1861 ("It is * * * the policy of the United States that all citizens shall have the

opportunity to be considered for service on grand and petit juries in the district courts of the United States * * *.").

"Determining whether the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." Graham v Connor, 490 US 386, 396 (1989) (internal quotation omitted). The community living under the use of force at issue certainly possesses a strong interest in considering the reasonableness of the practice, and it is appropriate to submit the question to a jury drawn from that community for determination.

Because "there is no clearly defined standard of reasonableness for the court to apply[,] * * * such a standard should emerge from the conscience of the community * * *." Bennett v Murphy, 127 F Supp 2d 689, 690 (WD Pa 2000), vacated on other grounds, 274 F3d 133 (3d Cir 2002). "The question of reasonableness [in an excessive force case] is quintessentially a matter of applying the common sense and community sense of the jury to a particular set of facts and, thus, it represents a community judgment." Wells v Smith, 778 F Supp 7, 8 (D Md 1991). Cf United States v Gleason, 616 F2d 2, 15 (2d Cir 1979) ("Confidence in our jury system leads us to leave credibility solely to the jury which, as the conscience of the community, is expected to act with sound judgment.").

Notably, the case in this district most recently tried before a jury in Eureka, Thompson v McCauley et al, Case No C-96-3942, also concerned section 1983 claims action against the County

of Humboldt, the City of Eureka and numerous officers for alleged civil rights violations, including excessive force.

Setting the trial of the present case in Eureka is not only permissible, but it comports with the fact-intensive inquiry required to determine whether officers acted with reasonable or excessive force against plaintiffs and with the recent practice of this court of locating trial where such an inquiry can best be made.

As the court explained at the March 27, 2003, hearing, this is a "case that arises in Humboldt County and seems * * * in as much as Humboldt County is an appropriate place, an official place of court, that that's the place to try this case." Rptr Trns (Doc #300), at 46.

D

Plaintiffs also contend that the court abused its discretion by failing to consider the "extreme[] inconvenience[]" that a Eureka trial site would impose on "some of the witnesses, to some of the plaintiffs, and to all of the attorneys for the plaintiffs." Pls Mem (Doc #277), at 8. But plaintiffs fail to identify a single witness or plaintiff who would be inconvenienced or how such convenience is "extreme." Plaintiffs also contend that the relative means of the parties weigh in favor of a San Francisco trial, but they present no evidence of their own means.

It remains without dispute that attending trial in Eureka would be convenient for many of the witnesses and parties on both sides. Although there is no legal basis to consider the convenience of attorneys in selecting a trial site, cf Soloman v

Continental American, 472 F2d 1043, 1047 (3d Cir 1973) (holding convenience of counsel immaterial under § 1404(a)), the court notes that one of plaintiffs' attorneys has submitted a declaration in connection with this very motion indicating that he was in trial in Eureka recently; that declaration did not suggest any inconvenience therefrom.

E

Finally, plaintiffs contend that "[i]t is virtually unprecedented" for a trial to be moved from a neutral ground to one that is "extremely hostile to one or more parties." Pls Mem (Doc #277), at 7. As discussed, plaintiffs have not established that a trial in Eureka would be prejudicial to their due process rights and insofar as juror impartiality is concerned, that is a matter for voir dire. Moreover, as previously noted, the statute creating the Northern District provides that "[c]ourt for the Northern District shall be held at Eureka," among other places. 28 USC § 84(a). The court regularly conducts extensive judicial business at its Eureka courthouse and has tried a case of similar type in Eureka in the very recent past. Hence, the decision to hold the trial in Eureka is hardly "unprecedented," but expressly authorized by statute, local rule and practice.

III

Finally, plaintiffs argue that the undersigned's decision to move the site of the second trial to Eureka constitutes "further proof" of the court's intention to prejudice plaintiffs. See Pls Mem (Doc #277), at 9 n5. Additionally, the court is in receipt of

a letter by plaintiffs dated April 29, 2003, requesting that the court decide their "pending" recusal motion "as soon as possible." The clerk is directed to file this letter.

By written order dated April 17, 2003, the court referred plaintiffs' recusal motions to the clerk for reassignment to another district judge. See Doc # 290. In that order, the court noted that "[t]o the extent plaintiffs' motion raises issues under 28 USC § 455, the judge to whom this matter is referred may wish to consider the Ninth Circuit's decision in In re Bernard in determining whether those issues should be resolved by the referral judge or by the undersigned." Id (internal citation omitted).

The recusal motion was promptly assigned to Judge Hamilton, who denied plaintiffs' motion. See 4/23/03 Order (Doc #306). Judge Hamilton expressly considered and addressed plaintiffs' section 455 arguments, holding that "plaintiffs have not established the appearance of bias, let alone actual bias" and that plaintiffs' motion thereunder was untimely. Id at 3-4. Hence, plaintiffs have already received a decision on their recusal motion under section 455. Id at 5 (denying plaintiffs' motion to disqualify the undersigned). Because Judge Hamilton's ruling addressed the court's decision to locate the second trial in Eureka, the court does not address plaintiffs' arguments touching on the court's motivation or bias in setting the location of the second trial.

Recusal under section 455, as explained by Judge Hamilton, "requires a mere appearance of bias." Id at 2. Section 455 "requires a federal judge to disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably

be questioned * * *." Id. Even if the section 455 motion should have been decided by the undersigned, it is clear based on Judge Hamilton's ruling that plaintiffs have failed to meet that objective burden. Id at 3 (holding that plaintiffs have not established either the appearance of bias or actual bias).

IV

In sum, the court DENIES as moot plaintiffs' motion for "change of venue" and DENIES their request to change the location of the second trial, which the court has designated to take place in Eureka (Doc #276).

IT IS SO ORDERED.

VAUGHN R WALKER
United States District Judge